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No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The briefs of Quincy Cable, NCTA and TBS in opposition to the petition are largely devoted to claims that the result reached below, "while indisputably important," is the correct result, in no small measure because that decision is said to be "one of a number of recent [lower court] decisions" invalidating long-standing cable television regulatory measures on First Amendment grounds. TBS Brief, p. 22. To support

such claims they rely, like the decision below, on a Ninth Circuit decision in which this Court quite recently granted certiorari. *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396 (9th Cir.), cert. granted, No. 85-390, ___U.S. ___(November 12, 1985).[1]

In the broadest sense *Preferred* and this case present the same ultimate issue: The extent to which, if at all, cable television, a *de facto* monopoly upon which some 43 percent of the American population depends for its television reception, is immune under the First Amendment from regulation aimed at insuring that cable systems provide certain services, or at least do not block or impede the public's reception of certain television services. But the narrow issues in *Preferred* and the instant case are not identical. Although both lower court opinions consider the issue in terms of an incidental burden on speech, the Ninth Circuit panel relied heavily on the public forum doctrine while in this case the D.C. Circuit panel extended the concept of "coerced speech" to cable systems. *Preferred* involves governmental authority to control use of public rights of way, authority that is typically exercised in this context by the mechanism of state or local government franchising. The instant case involves the FCC's jurisdiction, confirmed by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), to regulate the retransmission of television broadcast signals by cable systems. In the former situation the governmental entity typically seeks commitments that applicants will provide the "best" cable

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[1]See Quincy brief, pp. 10, 11; NCTA brief, pp. 16, 17; TBS brief, pp. 13, 22; Pet. App. pp. 20a, 30a, 32a.

service (in terms of the number and diversity of services relative to the prices charged), and offers as a *quid pro quo* a franchise to operate what almost invariably turns out to be a *de facto* if not a *de jure* monopoly. In the latter, the purpose is more narrow: to insure that cable systems, which historically have enjoyed (and continue to enjoy) a unique privilege to exploit broadcast signals, do not do so in ways which are disruptive or injurious to the overall purposes of the Communications Act of 1934, as amended. 47 U.S.C. §§ 151 *et seq.* (1982).

The federal regulations held unconstitutional by the court below have heretofore been held by this Court to preempt inconsistent state or local measures,[2] including, presumably, any inconsistent state or local franchise provisions. Moreover, unlike the governmental action at issue in *Preferred*, the must carry rules do not preclude anyone from operating a cable system or any cable operator from distributing any sort of programming (so long as the cable operator installs enough channel capacity to retransmit must carry broadcast signals and whatever else the operator wishes to distribute). Thus, the franchise regulation in *Preferred* might be viewed as creating an absolute barrier to entry that warrants somewhat different treatment.

Because of these and other differences, the Court's decision in *Preferred* will not necessarily be determinative in this case. Thus, deferring consideration of the petition in this case until *Preferred* is decided could leave the lower courts and the agency without appropriate guidance as to the federal element of the

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[2]Capital Cities Cable, Inc. v. Crisp, ___U.S. ___, 104 S. Ct. 2694 (1984).

cable regulatory-First Amendment equation. This case accordingly ought to be heard in tandem with *Preferred* so that the Court will have the benefit of a full development of the considerations bearing on the broad constitutional issue.[3]

Although it too urges denial of certiorari, the Memorandum of the Federal Respondents ignores the merits completely. This is perhaps understandable in view of the FCC's persistent but unsuccessful defense of the must carry rules prior to the decision below.[4] Instead, the Federal Respondents (p. 4) assert that

> "Review of the decision below is not warranted because the Commission no longer wishes to maintain the must-carry rules invalidated by the court of appeals."

The FCC's current "wishes" stand in rather sharp contrast to the agency's unwavering commitment to must carry rules over a period of some 20 years prior to the lower court decision.[5] In any event, agency

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[3]It ought to be feasible to brief and argue *Preferred* and the instant case in tandem during the current Term, and in any event, petitioners are amenable to any reasonable scheduling adjustments that the Court may regard as necessary to accomplish that objective.

[4]Only sixteen months ago, the FCC told the Court of Appeals that:

> "The must carry rule is . . . fully constitutional under established standards: the rule serves an important federal interest and it goes no further than it needs to in order to achieve the federal goal."

Brief of Respondent FCC, p. 16, July 25, 1984, in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (No. 83-2050).

[5]As late as the oral argument before the court of appeals on

"wishes" are not a valid reason for denying certiorari in this or in any other case in which those "wishes" are not supported by a reasoned analysis of the per-

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April 16, 1985, the FCC continued its persistent defense of the must carry rules. On August 2, 1985, a three-member majority of the FCC announced that the agency would not "appeal the [lower] Court's ruling" even though that ruling "unbalanced" the marketplace relationship of cable and broadcasting and made necessary a new Copyright Act that would create "an equitable realigning of free marketplace forces . . .;" the FCC majority also observed that

> "we cannot conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the [lower court's] *Quincy* decision."

Pet. App. p. 138a.

On August 23, 1985, the FCC advised the lower court that the agency supported a stay of mandate pending disposition of a petition for certiorari, noting that

"the panel's opinion raises important and difficult issues . . .."

Comments of FCC in Support of Motion for Stay of Mandate Pending Petition for Writ of Certiorari, p. 2.

On September 24, 1985 (the day after the petition for certiorari in this case was filed), FCC Chairman Fowler, writing as one member of the agency, assured a member of the Senate that, despite the FCC majority's August 2 statement that it could not conceive of a new set of rules which would satisfy the court of appeals and meet the agency's policy objectives, the FCC if formally asked to do so would consider proposals for new rules in the context of a new rulemaking proceeding. Mem. of Fed. Resp., App. pp. 1a-2a.

On November 18, 1985, the FCC formally announced the start of such a rulemaking proceeding, *Notice of Inquiry and Notice of Proposed Rule Making*, MM Docket No. 85-349, FCC 85-607 (copies lodged with the Clerk of this Court by the Federal Respondents). This *Notice* gives no clue as to what sort of rules, if any, the agency now regards as conceivably permissible and

tinent policy considerations or when they stem from an erroneous view of substantive law. Repeal of agency regulations, particularly in the case of long-standing regulations, requires a notice-and-comment rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553 (1982), followed by a "reasoned analysis" by the agency justifying its changed course of action, an analysis that goes well beyond what is required when the agency simply is declining to act in the first instance. *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

Here the FCC has not conducted a rulemaking proceeding looking toward repeal of the long-standing must carry rules. Rather, it has only just begun a quite different rulemaking proceeding which treats rescission of the long-standing rules as a *fait accompli* and which, on the basis of the decision below, adopts a presumption ("heavy burden of justification") against any new or substitute rules. Moreover, instead of a reasoned analysis justifying rescission on policy grounds, the FCC has simply announced, *sua sponte*, that it is enamored of the lower court's First Amendment analysis. But the lower court's analysis of the substantive constitutional issues cannot be presumed to be correct, for that is the very issue posed by the petition. Thus, the "wishes" of the FCC are irrelevant.[6]

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desirable. Rather the *Notice* calls upon proponents of new must carry rules to demonstrate both that such rules would serve the public interest and would satisfy the "heavy burden of justification on the Commission" which the lower court indicated would be necessary, at a minimum, to support the constitutionality of new rules. *Notice*, para. 8.

[6]The suggestion that the instant petition should not even be

The Federal Respondents (pp. 4-6) also assert that the FCC's November 18 action beginning a new rulemaking proceeding counsels in favor of denying certiorari.[7] However, the pendency of the agency's new proceeding is a rather dramatic demonstration that the "indisputably important" issues addressed by the lower court are not simply going to fade away. To the contrary, those issues have continuing significance to the lower courts, the administrative agency, and the public at large, and thus are precisely the sort of issues that ought to be resolved by this Court. Put another way, the agency *Notice* signals a wholly new proceeding made necessary by the court of

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deferred pending the outcome in *Preferred*, because the Federal Respondents have no "interest" in maintaining the long-standing rules (p. 6 & n. 4) is unsound for the same reasons. The agency's "interest," or lack thereof, is not the reasoned analysis that is required to justify repeal.

[7]While never made explicit, the Federal Respondents seem to be suggesting that the FCC might adopt new rules that might be similar to the old rules and that those new rules might be upheld as constitutional (perhaps even by the panel that rendered the decision below in this case), thereby obviating the need for this Court to resolve the constitutional issues.

If that is indeed their position, it is one that is unsound as well as implausible. For one thing, although the lower court paid some deference to the Article III truism that it was only deciding the case before it, when it observed that the FCC was free "to recraft the rules in a manner more sensitive to the [panel's perception as to the reach of the] First Amendment" (Pet. App. p. 60a), the opinion also warned the agency that the panel was not merely " 'quibbling over fine-tuning . . .." ' Pet. App. p. 53a. For another, even if all these events occurred, the parties who are unhappy with must carry rules would no doubt be knocking on the Court's door with their own petition for certiorari.

appeals, not just further proceedings after an interlocutory appellate decision. In the new proceeding the FCC will only adopt new rules if it concludes that those new rules can both (1) pass legal muster under the lower court's standards and (2) meet the agency's perception of what is appropriate as a matter of public policy. *See* Note 5 *supra*. The first of these twin inquiries involves essentially a legal issue, and it will be a misguided, if not pointless inquiry if, as we contend, the lower court's decision is unsound.

* * *

Judge Wright's opinion for the court below contains an elaborate development of a constitutional theory with significant implications for cable regulation generally. The case is ripe for immediate review by this Court. The Court has already (and quite recently) committed to review related constitutional issues in *Preferred*. Far from constituting a reason for denying certiorari, the FCC's recent decision to initiate a rulemaking proceeding simply underscores the fact that the issues addressed by the lower court are very much alive in the sense that they are likely to recur in that or other lower courts. Clarification of those issues by this Court now is therefore appropriate so that the FCC and lower courts will have the benefit in future proceedings of a definitive ruling.

Respectfully submitted,

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